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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 170.

THE SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

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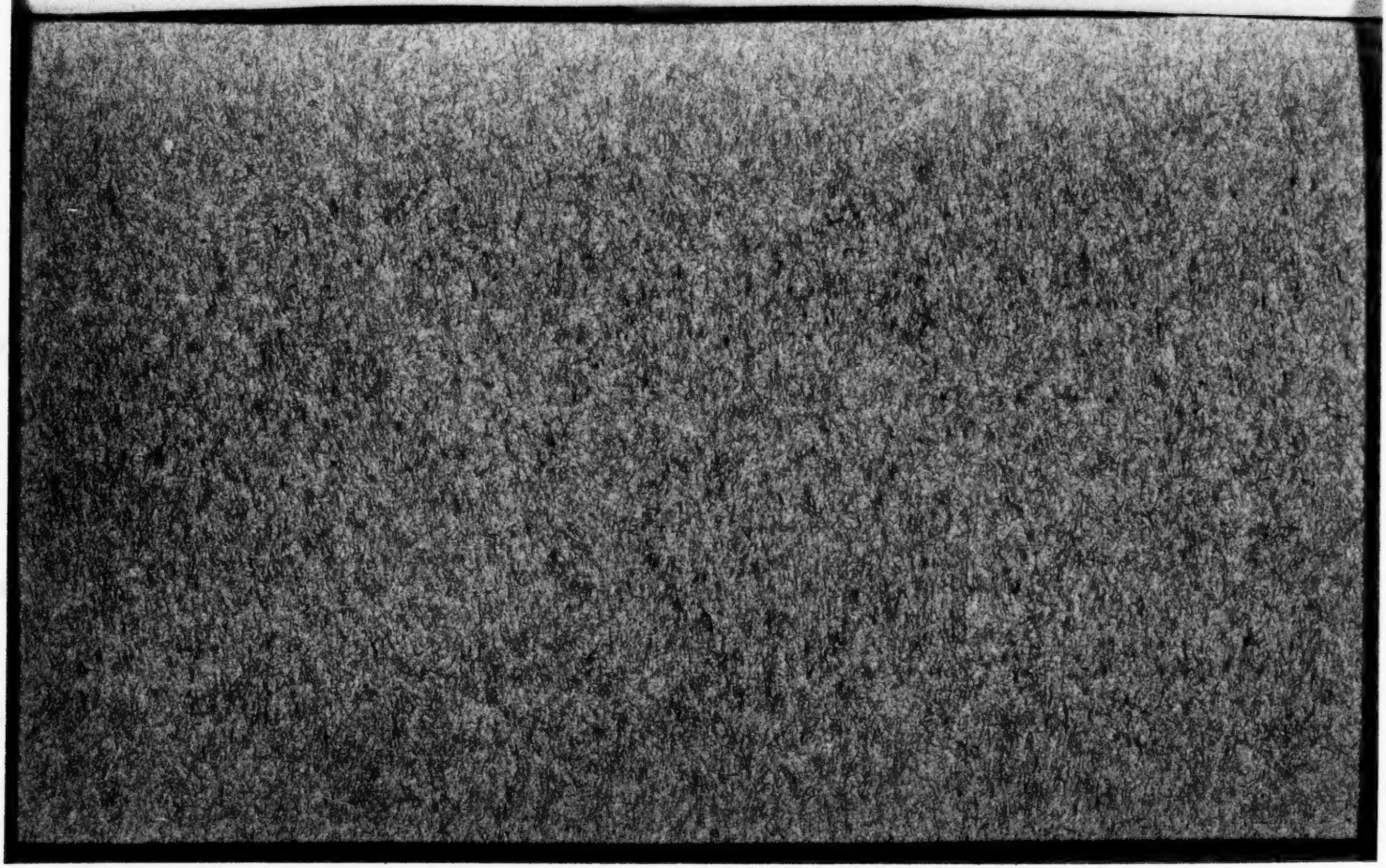

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BRIEF FOR APPELLANT.

Statement of the Case.

This cause comes on appeal from the Court of Appeals of the District of Columbia, sustaining the action of the Supreme Court of the District of Columbia dismissing a bill in equity filed by Appellant seeking to restrain the appellee from casting a cloud upon the title of appellant to some forty-six thousand acres of land in the State of Arizona.

The case arose upon a demand made under the direction of Franklin K. Lane, as Secretary of the Interior, upon the Santa Fe Pacific Railroad Company to deposit the sum of $5,500 to pay the cost of the field and office work involved in surveying lands in four named townships within the place or primary limits of the grant to the Atlantic & Pacific Railroad Co.

The text of the demand (Record, 4) was as follows:

> "Under and by virtue of the authority conferred upon me by the act of June 25, 1910, (36 Stat., 834) demand is hereby made upon you for a deposit, in a proper United States depository to the credit of the United States of $5,500, which is determined to be a sum sufficient to pay the cost of the field and office work involved in surveying the unsurveyed lands granted to the Atlantic & Pacific Railroad Company, within the primary limits of said grant in the following townships:
>
> T. 19 N., R. 5 W., G. and S. R. M., Arizona.
>
> T. 19 N., R. 6 W., G. and S. R. M., "
>
> Fractional T. 19 N., R. 7 W., G. and S. R. M., Arizona.
>
> T. 20 N., R. 7 W., G. and S. R. M., Arizona.
>
> "Should you neglect or refuse to deposit said sum of $5,500, as hereinbefore required, within ninety days from receipt by you of notice hereof, this department will notify the Attorney General to the end that he may at once, as provided in said act, commence proceedings to declare a forfeiture of the

> grant as to the townships enumerated, and to restore the granted lands to the public domain."

To this demand the Company responded (Record, p. 5):

(1). It was not liable for any part of the cost of surveying lands within the limits of its grant.

(2.) If it was so liable, it was only for the cost of surveying such lands as enured to the company under its grant, not to exceed the area of the odd-numbered sections in any township, whereas the demand made by the Secretary covered the estimated cost of surveying *all* the lands in the townships named, including both odd and even numbered sections.

(3.) Such demand was not only contrary to law and the uniform practice of the Land Department, but served to cast a cloud upon the title to lands fully earned by the company under the grant of Congress by the act of July 27, 1866 (14 Stat., 292).

(4.) Without admitting liability for the cost of surveying any of the lands described, but solely to aid in the adjustment and closing of its grant, the company made formal tender of one-half of such estimated cost within ninety days from date of demand, being sufficient to cover the cost of surveying all the odd-numbered sections within the townships named.

The tender thus made was refused and the orig-

inal demand insisted upon; whereupon and within the ninety days from date of demand, the plaintiff filed a bill in equity in the Supreme Court of the District of Columbia, praying for a writ of injunction restraining the defendant from insisting upon his demand, and alleging (Record, p. 6):

(*a.*) That the amount demanded for this survey of the townships named is the estimated cost of surveying the entire townships, including both odd and even numbered sections.

(*b.*) That the demand was a departure from the theretofore uniform administration under said act of June 25, 1910, and all other acts in anywise relating to the survey of land-grant lands.

(*c.*) That the demand was unlawful and in excess of any authority conferred upon the Secretary, and

(*d.*) That the action of the Secretary was arbitrary and resulted in casting a cloud upon the title to lands fully earned under a grant by Congress, and against this unlawful and arbitrary action the plaintiff had no adequate remedy at law and was remediless except in equity.

The defendant moved to dismiss the bill on the ground that plaintiff had not exhibited a cause for relief in equity, and upon hearing the bill was dismissed on the grounds that plaintiff could have made the deposit demanded of it under protest, and thereafter sued to recover the amount, citing New Orleans Pacific R. R. Co. *vs.* United States (124 U. S., 124), and in any event its rights could

be adjudicated in any proceedings brought by the United States to enforce the forfeiture (Record, p. 15).

From this decree, appeal was taken to the Court of Appeals for the District of Columbia, which court affirmed the decree below, holding that the provisions of the acts of 1876 and 1910 were applicable to plaintiff, and the Secretary's action thereunder was based upon a *possible* construction of the law and therefore not arbitrary or capricious so as to be subject to restraint by a court of equity (Record, pp. 19 to 23, inc.).

Plaintiff thereupon appealed to the Supreme Court of the United States, setting up the following assignments of error (Record, pp. 27-29).

Assignments of Error.

I.

The court erred in holding that the Santa Fe Pacific R. R. Co., by the provisions of the act of July 31, 1876 (19 Stats., 121), is required to pay the cost of surveying, selecting and conveying the lands granted by the act of July 27, 1866 (14 Stat., p. 292).

II.

The court erred in failing to find that by the provisions of sections 4 and 6 of the said act of July 27, 1866, it was made the duty of the Presi-

dent of the United States to cause the lands granted to be surveyed and patented to the company as fast as earned by the construction of the road, and that thereby the grantee company was specifically relieved from paying such costs.

III.

The court erred in failing to find that the Santa Fe Company, if required by said act of July 31, 1876, to pay any part of the costs of surveying, selecting, and conveying of the lands granted by the act of July 27, 1866, *supra*, was only required to make such payment (*a*) after specific sections or parts of sections had been determined to have been granted by said act, and (*b*) in amount equal to the expense incident to the surveying, selecting, and conveying of the specific sections and parts of sections so found to have been granted.

IV.

The court erred in finding that the provisions of the act of June 25, 1910 (36 Stats., p. 834), are applicable to the grant of July 27, 1866, *supra*, under which appellant claims.

V.

The court erred in failing to find that because appellant's right to the lands granted under the

act of July 27, 1866, *supra,* had become fixed and determined by the location and construction of the road long prior to the passage of the act of June 25, 1910, *supra,* said act could have no application to appellant's grant under the act of 1866.

VI.

The court erred in failing to find that the act of July 31, 1876, simply imposed a condition upon the right to obtain a patent to the lands granted, while the act of June 25, 1910, provided for a forfeiture on failure to advance costs for survey of lands, on the estimate of the Secretary of the Interior, and therefore, conceding that the act of 1876 applied to appellant's grant, it does not follow that the act of 1910 also applied, as the latter was passed after rights under the grant had become fixed by location and construction of the road, and said last-named act undertakes to impose an entirely new and very burdensome condition upon the title which had attached prior thereto.

VII.

The court erred in failing to find that, even if the act of June 25, 1910, *supra,* has application to appellant's grant, appellant is liable at the most for only one-half of the estimated cost for the surveying of the townships named, and that it had, prior to the filing of this action, made due tender

of the full amount which might be required of it, under said act.

VIII.

The court erred in failing to find that the demand by the defendant covered the entire cost of surveying the entire townships named, including the reserved alternate Government or even-numbered sections, and was therefore in excess of any authority granted, in direct conflict with the acts of 1876 and 1910, and therefore illegal and void.

IX.

The court erred in holding that, "Even if we were of the opinion that it would be more equitable for the Government to contribute towards the cost of this survey, there would still be no sufficient foundation for the ruling that the Secretary's decision was arbitrary and capricious, since the statute is susceptible of the construction placed upon it by him."

X.

The court erred in failing to find that the uniform administration by the Land Department of both the acts of July 31, 1876, and June 25, 1910, prior to the demand herein complained of, required payment under the act of 1876, only for the costs

of surveying, selecting and conveying of the lands actually conveyed, and under the act of June 25, 1910, of one-half of the estimated amount for the survey of the township involved, and that the alleged justification for the present demand, namely, the fact that the lands fall within the limits of an existing forest reservation, and for that reason the Government does not desire to survey its lands, amounts to an evasion of the express commands of the law, and is therefore, illegal and void.

XI.

The court erred in failing to find that the appellee's action with respect to the demand, the subject of this action, was not a reasonable construction of the act of June 25, 1910, and therefore, was an attempt at the exercise of arbitrary power in the face of the clear command of the law.

XII.

The court erred in affirming the decree of the Supreme Court of the District dismissing plaintiff's bill and discharging the rule issued thereon.

XIII.

The court erred in failing to grant to the plaintiff relief as against the unlawful, unusual and arbitrary demand of the defendant herein complained

of, which clouds the title of the plaintiff to the lands granted it by the act of July 27, 1866, *supra*, and the acts amendatory thereof.

In support of which assignments of error there is respectfully submitted the following:

ARGUMENT.

Legislation.

Act of July 27, 1866 (14 Stats. 292): By this act Congress provided for the organization of the Atlantic & Pacific Railroad Company, and conferred upon it and its successors and assigns a grant of the alternate odd-numbered sections within certain specified limits along and coterminous with the constructed railroad therein provided for. The grant was in the present tense, "that there be and hereby is granted" and was under accepted and well-established rulings of this court a *present grant*, the act operating as a conveyance as well as a law.

See Deseret Salt Co. *vs.* Tarpey, 142 U. S., 241.

By section 4 of the act Congress provided:

> "That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their service by the company to be determined by

> the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good substantial workmanlike manner as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States and patents of lands as aforesaid shall be issued to said company confirming to said company the right and title to said lands set opposite to and coterminous with said completed section of said road. And from time to time whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid and verified by said Commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid and so on, as fast as every twenty-five miles of said road is completed as aforesaid."

Section 6 of the act provided:

> "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad * * *."

The Contract.

It will be observed that under the express terms of this granting act, a present grant was made of the alternate odd-numbered sections falling within certain specified limits, to be earned by the con-

struction of the road opposite thereto, and it was made the duty of the President of the United States, as fast as any twenty-five consecutive miles of road shall be built, to have the lands opposite to such constructed road surveyed and to cause patents to issue to the company for the alternate odd-numbered sections falling therein, which patents were confirmatory of the grant as made by the act itself.

This grant was not only a grant and a law, but a contract, under which the railroad company undertook to construct a railroad, and in consideration of such construction it earned and was to receive patents for the odd-numbered sections opposite such constructed road, and within the lateral limits fixed by the act.

In *Burke vs. Southern Pacific Railroad Company* (234 U. S., 669-679) it was said:

> "We first notice a contention advanced on the part of the mineral claimants to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road, but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation and designate a line of railroad patents would be issued to

> the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company if it should do the work by patenting to it the land indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti vs. Dillon* (167 U. S., p. 703-721). And when by constructing the road and putting it in operation the company performed its part of the contract it became entitled to performance by the Government."

See also *United States vs. Grand Rapids & I. R. R.* (154 Fed. Rep., 131-136), where the court held:

> "The United States and the defendant railroad company entered into a contract by which the railroad company, in consideration of building the road was to receive certain lands. It was contemplated that on performing its contract it should receive the full amount granted."

Authorities might be multiplied to show the act of July 27, 1866, was a contract, and it was therefore beyond the power of the United States, one of the contracting parties to thereafter change the

terms and conditions of the contract, or by subsequent legislation after full performance by the grantee to impose any additional burdens upon the grantee.

When the United States makes a contract it is bound by the same laws which control the individual, and if as between two individuals the contract represented by the act of July 27, 1866, could not be changed by one of the contracting parties, such construction applies with full force to the United States.

> "The United States as a contractor are not responsible for the United States as a law giver." *Deming* case (1. C. C., 190).
>
> "When the Government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority and exchanges the character of a legislator for that of a moral agent, with the same rights and obligations as an individual" (3 *Hamilton's Work*, p. 518).
>
> "The Government, whatever power it may reserve over its own agreements cannot impose new contracts upon those with whom it deals." *United States vs. Railway Company* (104 U. S., 680-684).

Looking to the act of July 27, 1866, for the terms of the contract entered into between the railway company and the Government we find that the company obligated itself to construct a railroad satisfactory to the Government and to thereafter maintain same as a public highway, over which the

United States might transport its troops and munitions of war, and mails, at reduced cost, and in consideration of such construction, the United States bound itself, first, to examine the road as each twenty-five consecutive miles was built, and if satisfactory to accept the same, and upon such acceptance to cause the land opposite to said constructed portion to be surveyed, and to issue patents to the company confirming the title covered by the granting act.

No obligation was imposed upon the company to cause the lands to be surveyed, and indeed that was a function of the Government entrusted solely to the land department. It is true, the company was required to pay the reasonable cost of the examination to be made by the Government as the road was constructed, but the very fact that such expense was expressly imposed upon the company is significant of the effect to be given a failure upon the part of Congress to provide for any payment by the railroad company on account of surveying lands earned by construction, or of issuing patents covering the same.

Resolution of April 21, 1871 (17 Stat., 19).

It is also true, that by resolution passed April 21, 1871, the Atlantic and Pacific Railroad Company was authorized to mortgage all its franchises, including its land grant, and the rights of the purchasers under the mortgages issued by that au-

thority are clearly defined in the act of March 3, 1897, under which the Santa Fe Pacific Railroad Company was organized as the lawful successor of the Atlantic and Pacific Railroad Company, and in neither the resolution of 1871 nor the act of 1897 is any provision made requiring of such mortgagees or purchasers the payment of the cost for surveying, selecting or conveying the lands granted.

We have, therefore, not only a contract upon the part of the United States under the act of 1866, whereby the United States obligated itself, in consideration of the construction of the road, to cause the lands opposite to such constructed portion to be surveyed and patents to be issued, but we have the express authority of Congress for the original grantee to mortgage these lands. Such mortgage was given, and under a foreclosure of same Congress expressly authorized the purchasers to become incorporated as the Santa Fe Pacific Railroad Company and to receive the grant of lands made by the act of 1866, thus ratifying and confirming in the Santa Fe Pacific Railroad Company all the rights, title and franchises conferred by the act of 1866 upon the Atlantic and Pacific Company. There can be no reasonable ground for argument but that the Atlantic and Pacific Railway Company, in constructing this line of road opposite the lands here in question, acquired a title to the same, and itself and its purchasers, petitioner here, were thereby entitled without further cost or expense to

receive from the United States evidence of the title so granted.

The entire line of the road provided for in the act of 1866 was not constructed, and on *July* 6, 1886 (24 Stat., 123), Congress exercised its reserved power of forfeiture for breach of this condition by declaring a forfeiture ONLY of lands opposite the unconstructed portion of the road.

Prior thereto, by the *act of April* 21, 1871 (17 Stats., 19), the Atlantic and Pacific Railroad Company was authorized to mortgage all its franchises, including its land grant, and the rights of the purchasers under the mortgage issued by such authority are clearly defined in the *Act of March* 3, 1887 (29 Stats., 622), under which the Santa Fe Pacific Railroad Company, plaintiff in error, was organized as the lawful successor of the Atlantic & Pacific Railroad Company. The effect of this legislation was to confirm in the Santa Fe Pacific Railroad Company full title to the lands granted by the act of July 27, 1866, to the Atlantic & Pacific Railroad Company, which were opposite the portion of road constructed July 6, 1886, the date of forfeiture. *The lands the subject of this demand are opposite the road constructed and accepted prior to the forfeiture act.*

II.

The Act of July 31, 1876.

July 31, 1876 (19 Stats., 121), in an act making appropriations for sundry civil expenses and for other purposes, there was incorporated the following provision:

> "That before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto under any of the acts incorporating or relating to said company, *unless such company is exempted by law from the payment of such tax*, there shall first be paid into the treasury of the United States the cost of surveying, selecting and conveying the same by the said company or persons in interest."

We hope we have made it clear in our previous discussion that, under the act of July 27, 1866, the railroad company was not under any obligation to pay the cost of selecting, surveying and conveying the lands granted to it, and was therefore exempted by law from the payment of such cost, not only because of the failure of Congress to exact such cost in the original granting act, but because it was beyond the power of Congress to thereafter impose any additional obligations upon the grantee.

Reference is made by the court below to an adjudication under the act of July 31, 1876, *supra*,

entitled *New Orleans Pacific Railway Co. vs. United States,* 124 U. S., 124. That case involved the construction of the granting act of March 3, 1871 (16 Stat., 573). In that grant there was no provision respecting the survey of the lands granted as there was in the case of the grant under consideration. Further, that act required the road to be fully constructed within the period of five years, and after that period had elapsed without construction of any part of the road, and after the passage of the act of July 31, 1876, demand was made upon said company for the payment, not, as in this case, of the cost of surveying the entire townships, but only for the costs of surveying the lands granted to it. In order to secure patents the company made payment under protest, and later brought suit in the Court of Claims to recover the money so paid. In disposing of the case the Supreme Court said at page 127:

> "Congress had a right at any time to impose upon the grant the new condition, the company having failed to complete the whole of the road by March 3, 1871."

And again, at page 129:—

> "No limitation was imposed on the right and power of Congress, the company having failed even to commence the construction of any part of its road within the time limited, to virtually renew the grant and extend the time which the land might be earned, with the imposition of a new condition, that be-

> fore any patent should be issued, the cost of surveying the land patented should first be paid into the Treasury."

It will be noted that the act of 1876, herein just quoted, recognizes the fact that certain companies possessing grants from the United States were exempted by law from the payment of such costs, for it is specifically provided therein "unless such company is exempted by law from the payment of such costs." There was no provision in the New Orleans Pacific grant making it the duty of the President of the United States to cause the lands to be surveyed as rapidly as needed in the construction of the road, and it is our contention that the provision to that effect in the grant to the Atlantic and Pacific Railroad Company expressly exempted that company from the payment of such costs. Further, the United States forfeited a part of the Atlantic and Pacific grant because of default in construction, and while it may be admitted it might then have attached a condition as to survey, it did not, and presumably did not because of rights which had accrued under the mortgage previously authorized. As a consequence the act of 1876 and the adjudication referred to can have no possible application to the case now before this court, but even if applicable said act does not justify the demand in question.

We are strengthened in our position by the opinion of the Supreme Court recently rendered

in the case of *Lane vs. Watts*, 234 U. S., 526. That case involved claimed rights under the location or selection of one of the Baca Float grants issued in substitution of the Las Vegas grant. The conflict between two grants embracing the town of Las Vegas was settled by an act of Congress, passed June 21, 1860, 72 Stats., 71, which enabled the heirs of Baca claimants under one of the grants which was relinquished to select "an equal quantity of vacant land not mineral in the Territory of New Mexico, to be located by them in square form, not exceeding five in number." By said act it was made the duty of the Surveyor General of New Mexico "to make survey and location of the land so selected by the heirs of Baca when thereunto required by them." The Baca claimants urged that the act of 1860 devolved the duty on the Surveyor General of New Mexico to make the survey of the lands selected. On the other hand it was asserted that it was the duty of the claimants, under a later general act of June 2, 1862, 12 Stats., 410, to pay the costs of these surveys. In disposing of the matter it was said by the Supreme Court, at page 541 of its opinion, after referring to the granting act of 1860, in favor of the Baca heirs:

> "That act provides, as we have seen, that 'it shall be the duty of the Surveyor General of New Mexico to make survey and locations of the lands so selected by said heirs of Baca when thereunto required by them. * * * The obligation is explicit, and there

> was reason for it. To accommodate conflicting claims, and, at the instance of the Government, the Baca claimants gave up their rights to a definite tract of land, and, as appellees say, expressing the equities of the claimants, whatever its character or condition, and the Government therefore would naturally make provision for the location of the substituted lands as expeditiously as possible and without expense to the Baca heirs. We therefore think the act of 1860, not that of 1862, applied."

In the case now before the court the obligation upon the President, imposed by the sixth section of the granting act of 1866, is as explicit as that imposed upon the Surveyor General by the act of 1860, just referred to.

Finally, and in complete recognition of the exemption of the Atlantic and Pacific Railway Company from any payment of costs for the survey of the lands granted it by the act of 1866, we refer to the case of the *Atlantic and Pacific Railroad Company vs. Mingus*, 165 U. S., 413-441. This case arose upon an action of ejectment instituted by the Atlantic and Pacific Railroad Company against one Mingus, for the purpose of testing the forfeiture act of July 6, 1886, which forfeited the portion of the Atlantic and Pacific grant opposite the road then unconstructed. In resisting the right asserted by the United States in forfeiture the company set up the failure on the part of the United States to meet its obligation imposed by the granting act with respect to the survey of the lands granted the com-

pany. This obligation is recognized by the Supreme Court, but the failure of the United States in this particular is held insufficient to avoid the right of the United States to forfeit the lands opposite unconstructed road, and as against the claim of the company it was said that this failure on the part of the United States did not prevent the company from realizing the full value of the lands granted by mortgaging the road, which is a further recognition of the rights of the mortgagees and purchasers under the foreclosure of the mortgage, who, through incorporation, duly authorized, became the Santa Fe Pacific Railroad Company, the plaintiff in this action.

In disposing of this feature of the case it was said by the court, at page 441:

> "It is finally contended that the Government failed to fulfill its obligation to survey the lands, and that this was a condition precedent to its right to declare a forfeiture. This obligation is contained in the sixth section in the following language: 'That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad.' Evidently the failure to do this did not prevent the company from realizing the full value of the land granted by mortgaging the road, and it is open to doubt whether it could, under any circumstances, be insisted upon as a defence to the forfeiture."

It must not be overlooked that certain of the grantee claimants under railroad land grants were specifically required to pay the costs of surveying, selecting, and conveying the lands granted.

By the 21st section of the act of July 2, 1864 (13 Stats., 365), amendatory of the act of July 1, 1862 (12 Stats., 489), the Kansas Pacific Railway Company was required to pay the costs of surveying, selecting, and conveying the lands originally granted by the act of 1862, as well as those granted by the act of 1864.

In extending the grant from five to ten sections per mile Congress added a new condition, and this was sustained by the Supreme Court upon the ground that as none of the road had been built when the amendatory act was passed no right had vested in any of the lands granted by the act of 1862, and consequently the power as well as the intent of Congress to require such payment cannot be questioned.

Railway Company *vs.* Prescott, 16 Wall., 603.

By the act of July 15, 1870 (16 Stats., 305), it was specifically required that before any lands granted to the Northern Pacific Railroad Company shall be conveyed there shall be paid into the Treasury the cost of surveying, selecting, and conveying the same.

This exaction was sustained by the Supreme Court upon the ground that, until the condition of

the grant had been met and the lands earned, it was within the power of Congress to annex a condition requiring payment of the cost of surveying, etc., before conveyance of the lands was made. Northern Pacific R. R. Co. *vs.* Traill Co., 115 U. S., 600. In that case the county was seeking to charge the lands with taxes before conveyance, and the decision was largely to protect the interest of the United States in its right to receive the costs for surveying, etc., otherwise the lands, if subject to taxes, might be sold freed of any rights therein.

The act of April 20, 1871 (*supra*), authorizing a mortgage of the Atlantic and Pacific grant, specifically provided:

> "That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

This clearly fixed the rights of the mortgagees to the lands appertaining to road constructed at time of foreclosure of the mortgage, which included the lands the subject of this demand.

There was no attempt to fix a new condition requiring payment for costs of surveys respecting such lands, as had been done in the case of the

Kansas Pacific by the act of 1864 *and the Northern Pacific by the act of* 1870, *just the year before.* Again, in the act of March 3, 1897, *supra,* defining rights of the purchasers under the mortgage, it was provided:

> "But such new company shall be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company *was subject under its charter or act of incorporation.*"

How, then, can an intent to charge the plaintiff company with the costs of surveying, selecting and conveying the lands granted to its predecessor in interest be spelled out of this legislation?

The several acts respecting the Atlantic and Pacific grant amounted to contracts between the United States and the Atlantic and Pacific Railroad Company and its successor, the plaintiff herein, under which the grantees were to receive certain lands in consideration of the building of the road, and it was contemplated that the grantee, on performing its contract, should receive the full amount granted without other conditions than those imposed. To attempt to attach a new condition after the full performance on the part of the transferees would amount to an impairment of a contract, which should not be imputed to Congress.

United States vs. Grand Rapids R. R. Co., 154 *Fed. Rep.,* 131-136.

III.

The Act of June 25, 1910.

Should we concede, for the sake of argument, however, that the act of 1876 was applicable to this grant, it follows that said act only imposed upon the company the cost of surveying, selecting and conveying the lands granted to the company. Immediately after the passage of the act of 1876, the Land Department started the practice which has been consistently followed ever since, of examining lands which had been surveyed by the United States, and such of the lands as were found to be free from adverse claim, and of the character granted, to include same in a clear list, which, upon approval by the Secretary of the Interior, would be ready for patenting. Before such patent was issued, however, the General Land Office would calculate the cost of surveying the particular lands thus approved, and to be patented, and would call upon the railroad company for the payment of such cost as preliminary to the issuance of a patent. In this way, the companies were only required to pay the cost of surveying the particular lands to be patented to them at the time when such lands had been surveyed and found to be of the character granted and properly patentable.

February 27, 1899, Congress passed an act which authorized railroad companies to advance to the

United States moneys to cover the cost of surveying lands falling within the limits of their respective grants, and the certificates of deposit covering such payment were receivable by the United States when patents were ready for delivery as evidence of the payment of so much money as was shown thereon. The practice continued, however, after the passage of this act of calculating the cost of the particular lands to be patented, and of calling upon the company for the payment of the same.

The act of June 25, 1910 (36 Stats., 834), under which the defendant herein assumed authority to make the demand now in question reads as follows:

> "*Be it enacted, etc.*, That to enable the Secretary of the Interior to complete the adjustment of land grants made by Congress to aid in the construction of railroads, and to subject the lands granted to taxation by States, Territories and municipal authorities, *any railroad corporation required by law* to pay the costs of surveying, selecting, or conveying any lands granted to such company or corporation, or for its use and benefit, by any Act of Congress, shall be, and is hereby, required, within ninety days from demand by the Secretary of the Interior to deposit in a proper United States depository, to the credit of the United States a sum sufficient to pay the cost of surveying, selecting and conveying any of the unsurveyed lands *granted to such company*, or for its use and benefit under any act of Con-

gress: *Provided*, further that the Secretary of the Interior shall determine and specify in the notice or demand to such company the amount of the required deposit, and may, in his discretion, demand a sum sufficient to cover the cost of the survey, selection and conveyance of the entire area granted to any company, or for its use and benefit, then unsurveyed, or for such townships or fractional townships as he may prescribe and designate in the notice or demand to such company, as aforesaid: *And provided further*, That the amount deposited shall, subject to the rules and regulations of the Department of the Interior, under the direction of the Commissioner of the General Land Office, be disbursed for the surveying, including office and field work, selection and conveyance of the lands granted and designated in the notice of the Secretary of the Interior, as aforesaid: *And provided further*, That in the event the money deposited by any railroad corporation under the provisions of this act shall exceed the cost of said surveys, the said excess thereof shall be repaid to the corporations so depositing the same, or to its assigns.

"SEC. 2. That if any railroad corporation required by law to pay the costs of surveying, selecting or conveying any lands granted to such corporation, or for its use and benefit, by any Act of Congress, shall, for ninety days from notice or demand by the Secretary of the Interior, as provided in this Act, neglect or refuse to deposit an amount sufficient to meet the expense of surveying, selecting and conveying the unsurveyed lands granted to such company, or for its use and

benefit, by any act of Congress, and designated in the notice or demand by the Secretary of the Interior, as aforesaid, the rights, title and interests of such company, and all those claiming by, through or under it, in and to the unsurveyed lands designated in the notice of the Secretary, as aforesaid, shall cease and forefeit to the United States; and the Secretary of the Interior shall notify the Attorney-General, who shall at once commence proceedings to declare the forfeiture and to restore the lands forfeited to the public domain.

"SEC. 3. That this act shall not affect the right of the Secretary of the Interior to cause the public surveys to be extended over any lands granted to any railroad or corporation by any Act of Congress in the manner now otherwise provided by law, nor shall any claim, right, interest, or demand of the Government of the United States be waived or annulled by the provisions hereof: *provided*, That all granted lands surveyed under the provisions of this Act shall be subject to taxation by States, Territories, and municipal authorities, and the right of the Government to reimburse itself for the survey, selection, and conveyance of such lands otherwise provided by law shall remain in full force and effect.

"SEC. 4. That the Secretary of the Interior shall prescribe such rules and regulations as will be necessary to the carrying out of the foregoing provisions."

It will be noted that this act embraces any railroad corporation *required by law* to pay the cost of surveying, selecting or conveying any lands

granted, and the demand therein provided for is expressly limited to a sum sufficient to pay the cost of surveying, selecting and conveying any of the unsurveyed lands *granted to such company.* Under the second section of the act upon neglect or refusal to deposit an amount sufficient to meet the expense of survey, selecting and conveying the unsurveyed lands "granted to such company, or for its use and benefit" within ninety days after demand, the right, title and interest of such company in and to the unsurveyed lands designated in the notice, shall cease and be forefeited to the United States. If this company was not required by the granting act of 1866 to pay the cost of surveying, selecting and patenting lands granted to it, and if such obligation could not be and was not imposed upon the company by the act of 1876, it naturally follows that it is not a company or corporation required by law to pay these costs, and therefore does not fall within the language or intent of the act of June 25, 1910. Should it be held otherwise, however, there is nothing in the act of June 25, 1910, to indicate any other purpose upon the part of Congress than to require the railroad companies to pay in advance of survey those expenses which they had theretofore been required by law to pay when patents were ready to deliver, that is, the cost of surveying, selecting and patenting the lands granted to the respective companies. This is made very clear by the report of the Secre-

tary of the Interior to Congress, and by the Committee recommending the passage of this bill.

Senate Report 609 (61st Congress, 2d session) reads:

> "The necessity for this legislation arises from the fact that under their grants railroads are required to pay *one-half* the cost of surveying the lands within their granted limits, and the companies have not, in all cases, made the required deposits to enable the Department to proceed with the survey of such areas.
>
> "Congress by the act of March 2, 1895, provided for a continuing appropriation of $100,000 to be used for the survey of lands within the limits of land grants, but this appropriation has not been used for some years past by reason of the fact that it has not been available for office work on surveys executed under it."
>
> "The Department suggested this legislation with an appropriation of $500,000, but the Committee did not feel authorized to report the bill with an appropriation, and therefore struck out that portion of the bill, taking it for granted that the Secretary of the Interior would call upon the Congress for a sufficient appropriation from time to time, *to cover the Government's share of the cost of the work of surveying as it progressed.*"
>
> "It is deemed wise and important that these lands be surveyed as promptly as possible for various reasons—first, that they may become taxable by the States and communities; second, that the Government may dispose of its lands which adjoin the rail-

> road lands, and in order that where the railroad lands occur within forest reservations —about 3,000,000 of the unsurveyed lands being in reservation—the Government officials may be able to determine the boundaries of the public lands for the purpose of regulating and controling the same, selling the timber, etc."

Although plaintiff is exempted by law from paying any costs of survey, in order to facilitate the adjustment of its grant, it has, under protest, paid the estimated costs for surveying the lands found to enure to it under its grant, and when the present demand was made, covering as it did the entire cost for surveying both the odd and even numbered sections, the company tendered one-half of this estimated cost as the limit of the lands which might be secured by it. The plaintiff has thus sought to harmonize the situation with the Land Department as far as possible, and only filed this bill because of the arbitrary action requiring it to pay for surveying the Government sections.

In the Senate report, just referred to, in giving the unsurveyed area within the limits of railroad land grants, it was reported that there were 5,604,584 acres of such land within the Atlantic & Pacific grant. It was understood that the present demand was but a test, so that had the company acceded thereto it might reasonably have been expected to be called upon to deposit the large sum that would be necessary to survey not only the five

and one-half million acres of odd-numbered sections granted it, but an equal area of even-numbered sections reserved to the United States. Manifestly such an unconscionable demand cannot be upheld under this legislation.

We are not going to discuss the possible suggestion of counsel for the Government as to what the demand is meant to cover, or that the lands being in a forest reservation, the United States does not at this time desire to survey its even-numbered sections, but rest upon the broad statement that the bill alleges, and the answer does not deny, that the sum of $5,500.00 demanded by the Secretary is a sum sufficient, and was intended by the Secretary to be for the purpose of surveying both the odd- and even-numbered sections, within the townships named. By no possible method of construction known to us can the act of June 25, 1910, be tortured into an authority for any demand upon the company other than the cost of surveying, selecting and patenting those lands granted to the company. Any demand in excess of that sum is a demand unauthorized by law and beyond the power of the Secretary of the Interior to make. Whilst we are confident that we are correct in our first contention that this company is not required by law to pay any of the costs of surveying, selecting and patenting lands granted to it, we are equally confident that even though the court should hold such liability to be upon the company, it cannot possibly extend that liability beyond the cost of surveying,

selecting and conveying lands so granted, which can never, under any possibility, be more than the alternate odd-numbered sections, or half the area of each township included within the limits of the grant.

IV.

In the dissenting opinion of Mr. Justice Van Orsdel in the court below, he concurs in holding the Act of June 25, 1910 applies to this grant. This is apparently upon the assumption that the act of 1876 also applies. Whilst we have endeavored to demonstrate *supra* that the act of 1876 does not apply to this grant, nevertheless its application does not necessarily include the act of 1910. The act of 1876 simply imposed a condition upon the right to obtain a patent to the lands where the road had not been constructed until *after* the passage of the act of 1876 and where in the granting act there had been no exemption from the payment of the costs of survey.

The company might well have rested upon the title contained in the granting act and never made a demand upon the government for the complete evidence of such title through patents. The act of 1910 makes it compulsory upon the company to pay such fees and provides a forfeiture in case of failure to pay. This imposes an entirely new and extremely burdensome condition upon the title of the company, which had attached prior thereto upon the construction of the road.

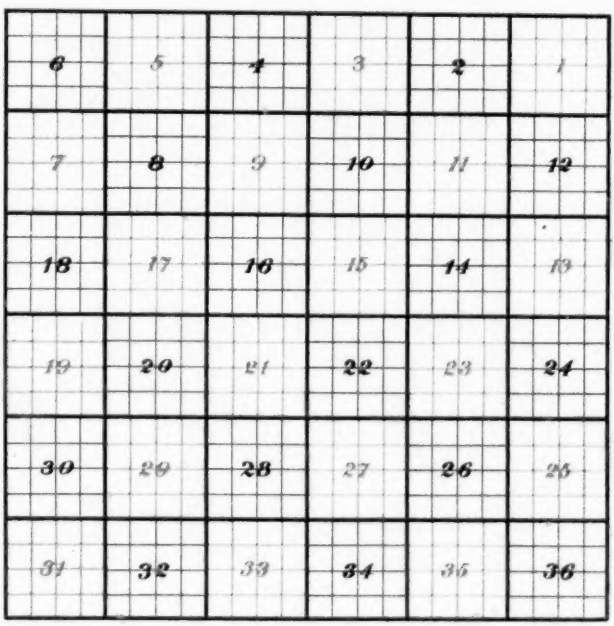
Whatever may be said in defense of the right in Congress by the act of 1910 to require a payment in advance of survey from those companies already required by law to pay subsequent to survey, there can be no justification for attaching to such requirement a penalty of forfeiture. The day had long passed in 1910 when conditions warranted or permitted the United States declaring a forfeiture excepting for non-construction of the road, and the application of the act of 1876 may well be granted, without admitting any possible opportunity for a declaration of forfeiture in 1910.

This provision of the act of 1910 is therefore clearly unconstitutional and should not be upheld.

V.

The Method of Surveying.

The grant to the Atlantic and Pacific Railroad Company made by the act of July 27, 1866, *supra*, was of the alternate *odd-numbered* sections within certain designated limits. The court is perhaps aware, but in order that there may be no misunderstanding in the matter we call attention to the fact that under the public-land system of surveys in force for more than one hundred years the lands are divided into townships six miles square, and the townships are in turn subdivided into six tiers of six sections each, making thirty-six squares or sec-


6 5 4 3 2 1
7 8 9 10 11 12
18 17 16 15 14 13
19 20 21 22 23 24
30 29 28 27 26 25
31 32 33 34 35 36

tions, each one mile square, as shown on the following diagram.

These squares are denominated as sections and they are numbered consecutively, beginning at the northeast corner of the township, from 1 to 36. Each section is, in turn, subdivided into quarter sections, and each quarter section, in turn, divided into quarter-quarter sections. In making the surveys of the different sections and parts of sections the stones or other markings placed upon the boundaries necessarily become a common boundary for two sections, and in the instance of the corner to the sections it becomes a common corner to four sections. It is, therefore, impossible to survey the *alternate odd-numbered sections* of any township without at the same time accomplishing the survey of the *alternate even-numbered sections.* In attempted disposition of the protest filed by the railroad company against the demand for deposit in the given case the defendant replied:

> "It is not now proposed to survey any of the public lands within the townships specified in the demand made on the company. It is the judgment of the Department that the public interest requires the immediate survey of the railroad lands in those townships, and that the public interest does not require the survey of the even-numbered sections in those townships. Under such circumstances the Department is clearly of opinion that the company was properly required to pay the cost of the field and office work involved in the survey of its granted lands, even

> though it be admitted that the cost to the company would be much less were it deemed proper at that time to direct the survey of all the lands within the townships named."

As we have just asserted, and as will be borne out by the most casual examination of the manual of surveys governing the survey of public lands, it is impossible to make a proper survey and marking of the odd-numbered sections of a township without at the same time accomplishing the survey and marking of the even-numbered sections, and therefore the matter is not one resting upon intent. In other words, that whether the survey includes the whole township or only one-half of it is not governed by intent when under the work done the whole accomplishment is had. If, however, the matter could be determined merely by intent at the time, then at a later date, when the intent was conceived to survey the *even* sections in the township in which the *odd-numbered* sections had been previously surveyed, the very same work would have to be done over again, and if it were possible it would be clearly improper, as thereby the Government, merely to satisfy a psychological condition existing in the mind of the departmental official, would be forced to pay twice the costs properly apportioned to the survey of the even-numbered sections, or the public lands, in the given township. However, this matter is fully concluded for the present case

under the pleadings, for in the bill it was specifically alleged in paragraph twelve of the bill:

> "That the amount demanded of your orator for survey of the townships named is the estimated costs of surveying the entire townships, including both the odd and even numbered sections thereof, and in this respect is a departure from the heretofore uniform administration by the Interior Department under the said act of June 25, 1910, and all other acts in anywise relating to the survey of the land-grant lands."

The defendant moved to dismiss this bill which, under the new rules of equity practice, is the substitute for a demurrer, and admits all material facts pleaded in the bill.

We have heretofore shown that the Atlantic & Pacific Railroad Company was specifically exempted from payment of the costs for the survey of the lands granted it by the act of 1866. However, if we be wrong in this contention and it be found that the general act of July 31, 1876, *supra*, has any application to this grant, we note that by the act of 1876 the companies falling within the operation of that act were only required to pay the costs of the surveys of the lands granted *before conveyance thereof* was made to the company. As no conveyance could be made until the lands were surveyed it follows, as a consequence, that any demand under the act of 1876 could only be made after the lands in any given township had been

surveyed, and then only to cover the costs incident to the survey of the particular sections in those townships found to pass under the grant to the railroad company, and which were about to be conveyed.

It is well known that under the exceptions found in the granting act all lands mineral in character, and also those which had been disposed of or which were claimed or occupied at the date of definite location, were excepted from the grant, and although there are eighteen odd-numbered sections in a given township it is not infrequent that one or more of the odd-numbered sections, and in some instances a one-half or perhaps the whole of them, may be excepted from the grant by reason of character or conditions existing thereto at the date of definite location.

In the administration of the act of 1876 by the Land Department it has been usual to divide the costs of the survey of the entire township into thirty-six parts, furnishing the cost to be charged for the survey of any one section, and this is multiplied by the number of sections finally found to pass under the grant. It will thus be seen that to admit that the act of 1876 has any application to this grant, that act furnishes no warrant for the demand made in this instance, and the court below erred in not granting relief through injunction against the unlawful and arbitrary act of the defendant in demanding of the company payment of a sum knowingly in excess of any amount that

might be required for the survey of all the lands which might, under the most favorable conditions, pass under the grant in the townships named in the demand.

VI.

The Right of Plaintiff in Error to Sue in Equity.

The Supreme Court of the District, whilst recognizing its jurisdiction in this case, declined to consider the merits upon two grounds:

(*a*) that, if the plaintiff made the deposit under protest, it could sue to recover the amount so deposited, and

(*b*) that the plaintiff would have full opportunity to test its rights in any action brought by the United States to declare a forfeiture for failure to make the deposit demanded.

In order to defeat the right of the plaintiff to its remedy in equity it is necessary to show not only that it has a remedy at law, but that such remedy is as fully adequate and complete as its remedy in equity.

The Act of June 25, 1910, is One "In Terroram."

Now, in the first place the act of 1910 is an act *in terroram*, under which the Secretary may make a demand for the forfeiture of title to large areas of land in the event of failure to make the deposit

within ninety days. It will be realized by this court that the grant to this company is extensive and the area of unsurveyed lands within its limits large, and if the Secretary of the Interior can lawfully enforce this demand for $5,500, he can enforce a much larger demand covering the entire balance of unsurveyed lands within the limits of the company's grant. The possibility of losing title to such an area in any action brought to forfeit the grant would in and of itself prevent any company from risking the decision, and thereby deprive it of a fair opportunity to list its rights at law.

The act of 1910, passed after the vesting of title and seeking to impose a new condition by providing for payment of estimated survey fees and for forfeiture of title in case of non-payment, attempts to create a new condition subsequent and was intended to act *in terroram* upon the company so as to force it to forego litigation in court, but to comply with a harsh and illegal condition rather than risk the danger of a declaration of forfeiture of its entire estate as prescribed in the act.

Of recent years it has been held by the Supreme Court of the United States that where the legislation seeks to impose penalties of a drastic nature for the apparent purpose of forcing a compliance with its demands and intimidating a party from resorting to the courts for an orderly adjudication where property rights are involved, such legislation is unconstitutional.

In Wadley Southern Railway *vs.* Georgia, 235 U. S., 651, this court had occasion to consider an act of the Georgia Legislature requiring public utility corporations to comply with every order made by a commission of the State under penalty of a forfeit of not more than $5,000 for each offense, and, after referring to various previous adjudications, the court held:

> "These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rules or orders legislative in their nature."
>
> "Their legality is not apparent on the face of such orders but depends upon a showing of extrinsic facts. A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for vio-

> lation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

In *Ex parte* Young, 209 U. S., 123, where a statute fixed rates and, though it afforded no opportunity for a judicial hearing to determine whether the rates were confiscatory, yet imposed heavy and cumulative penalties for collecting other than such statutory rates, the court said:

> "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect their rights."

These cases and the numerous decisions referred to therein establish beyond the need of further argument, that those affected by a statute passed without their having an opportunity to be heard are entitled to a *safe and adequate* review of the legality thereof. It is a denial of due process of law if such review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law.

In this case had the plaintiff been satisfied to refuse the demand, without seeking relief in equity, no opportunity would have been afforded to secure a judicial review of the law, except at the enormous risk of losing title to some 46,000 acres of land. The act of 1910 plainly declares a forfeiture upon failure to make deposit within ninety days of the demand, and the proceedings in court are to enforce the forfeiture. The result of waiting for such litigation in order to test the legality of the demand is necessarily to run the risk of forfeiture in case the demand should be upheld.

The act, if limited to its proper meaning and applied only to deposits covering the cost of lands granted to the companies, is intended by its terms of forfeiture to prevent railroad companies from testing such a demand at law. The forfeiture is declared by the act upon the failure of the company to make the deposit, and thereby a cloud is cast upon the company's title to the lands embraced within such demand, which may or may not be removed by an action of forfeiture brought by the Attorney General in the name of the United States.

It is true, the act makes it the duty of the Secretary of the Interior to report the failure to deposit to the Attorney General, and the Attorney General upon such report could institute proceedings of forfeiture, but such proceedings may not be actually brought, or, if brought, may be so numerous and cover such an area as to greatly

multiply the number of suits and make the suggested relief uncertain and expensive. If the act of 1910 has no application to this plaintiff, or if the main demand thereunder by the Secretary is in excess of the amount which he may lawfully exact, this court is more competent to determine those questions than any other, and the action brought presents a quick and effective method of determining the rights of the parties without placing one of them in jeopardy of losing a large area of land in the event of an adverse conclusion.

The Right to Equitable Relief Under an Ambiguous Statute.

It may also well be urged that a court of equity should assume jurisdiction to prevent the enforcement of a penalty or forfeiture especially where the claim of the Government rests upon an ambiguous statute and where its claim may be readily compensated by a provision in the decree requiring the company as a condition to its right to relief to pay the amount demanded, if it be found to be just and if it be found that the company was mistaken in its construction or interpretation of the law.

That courts of equity of old have entertained jurisdiction to give relief against forfeiture where the party claimed the ground of forfeiture could be obviated or removed by payment of an amount for which the forfeiture was had, is discussed and favorably decided in Sanders *vs.* Pope, 12 Vesey,

Jr., 282, Second Story's Equity, 12th edition, secs. 1314 to 1318.

Such relief is frequently granted to mortgagors under deeds of trust where the estate of the mortgagor had been forfeited under the terms thereof by failure to pay the sum secured.

Assuming that the Government has a right to be reimbursed for costs it might be put to in surveying the lands granted, and therefore, in respect to such lands under the act of 1876 it would have a lien upon the same as security for its expenses, such claim involving a possible disputed question as to the proper amount, as well as its validity, should only be enforced by an appropriate proceeding to make it a charge upon the land, and sell the land after the charge has been established, if the grantee failed to pay. It is, however, going beyond all constitutional legislation for Congress to prescribe for the enforcement of a claim by forfeiting the grantee's title in a proceeding where the grantee is giving no opportunity to have first determined the validity of the Government's claim before being required to lose its land, and in a proceeding where the only question would be whether the Secretary's demand for an amount fixed by him had been made upon the grantee and not paid within the time required. Such a provision in an act of Congress has exactly the same effect as an act of a State legislature and in such cases this court has clearly and conclusively held that it amounts to a taking of property without due process of law.

VII.

The Suit is One to Remove a Cloud Upon Plaintiff's Title, for Which the Defense at Law Would be Inadequate.

The possible opportunity of defense to a suit brought in enforcement of the forfeiture declared by the act of 1910, where the demand is not met within the time limited, does not bar the present proceedings.

We have heretofore called attention to the fact that under the act of 1910 the forfeiture therein provided for is operative *upon the expiration of the time limited within which to meet demand made thereunder*. As a consequence, we think it is clear that there is a cloud placed upon the company's title as soon as the demand is made, and that that cloud continues until the demand is recalled by the officer making it, or he is enjoined from further enforcement of it through some appropriate proceeding.

Anything is a cloud which is calculated to cast doubt or suspicion upon the title or which seriously embarrasses the owner either in maintaining his rights or in disposing of the property. The right to maintain this bill rests upon the well-known head of equity jurisdiction to relieve against a cloud upon title to lands, and the mere fact that the grounds set up in the equity suit might be available in defense of an action at law does not deprive an equity court of jurisdiction. A court of equity

should entertain jurisdiction to prevent a defendant, whether a private individual or an official acting under color of authority, but without warrant of law, from creating a cloud upon the title to lands which would embarrass the owner thereof in his subsequent dealings with respect thereto. The case, therefore, falls under the head of jurisdiction to prevent a threatened wrong which might result in embarrassment or incalculable injury to the party complaining.

The object of this suit is to restrain the defendant from consummating or carrying out his wrongful demand, and therefore presents the questions not only as to the applicability of the statute to the grant of the plaintiff company, but also the question of the constitutionality of the act, if, under a proper construction, the act be held applicable to the company's grant.

As heretofore clearly shown, full title had passed to the plaintiff company under the land grant, through the construction and acceptance of the road, long prior to the passage of the act of June 25, 1910, under which this demand was made, a patent not being necessary in order to vest title under the grant.

The general act of 1876, hereinbefore referred to, did not attempt to impose a new condition upon the vesting of the title under the railroad grant, but simply to impose a condition upon the right of the railroad grantee, preliminary to the issuance of a patent, which would be a mere evidence of the title

already passed. With respect to the act of June 25, 1910, if demand thereunder be not complied with, it results in clouding the title as before shown, which may be followed by a threatened suit which makes the cloud upon the title more pronounced. Certainly if the Secretary be permitted to consummate his threat, it would seriously hamper the plaintiff in disposing of these lands until such time as it might please the Attorney General to institute a suit of forfeiture and press the same for a final determination.

All lands of the United States are not subject to disposal, they may be reserved for one purpose or another, but generally the public domain is open to disposition under laws passed by the Congress. The forfeiture declared by the act of June 25, 1910, is complete, so far as clouding the company's title, even though no suit should later be instituted in enforcement of the forfeiture. Such suit would only be necessary where it was desired to thereafter open the lands to disposition, and as these lands are within a forest reserve there is no demand for present opening of the lands to entry.

The act of June 25, 1910, provides upon the failure to meet the demand within the time limited, that "the Secretary of the Interior shall notify the Attorney General, who shall at once commence proceedings to declare the forfeiture and to restore the lands forfeited to the public domain." What these proceedings shall consist of is not defined, and what would be available to the grantee claimant in

defense of such proceedings is, to say the least, doubtful. From the present demand, limited as it is to four townships, with an area of five and one-half million acres unsurveyed within the limits of its grant, the number of proceedings that might be instituted in declaration of forfeiture can readily be appreciated. A land owner is not obligated to await the pleasure of another party to have his rights determined, but, on the contrary, either where a cloud has been created upon his title, or where the other party threatens to do illegal acts which will create such a cloud, the land owner may proceed as speedily as possible and in his own way, to have the matter adjudicated and the cloud removed or prevented. We think, therefore, the suggestion in the opinion of the court below, in the particular noted, is no answer to the present proceedings.

If the defendant has exceeded the authority conferred upon him by law and has cast a cloud upon the plaintiff's title under its grant, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action. That is the specific holding of the Supreme Court of the United States, in the case of Garfield *vs.* Goldsby, 211 U. S., 249-262, wherein this Court, speaking through Mr. Justice Day, said:

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises as conferred by the acts of Congress. We appreciate fully

the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this Court after showing its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against actions without due process of law, it has always been recognized that when one has acquired rights by an administrative or judicial proceeding he cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken, or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In the very recent case of Land *vs.* Watts, hereinbefore referred to, an injunction was prayed, restraining this same defendant from further proceedings respecting a grant where title thereunder

had ripened by full compliance with the conditions of the granting act, as is the case now before this court. A demurrer was filed to the bill, and in summing up the case the court said at page 540 of the opinion:

> "The suit is one to restrain the appellants from an illegal act under color of their office, which will cast a cloud upon the title of appellees."

Is not that the exact situation presented in this case? We think, therefore, that the court below clearly erred in failing to consider the plaintiff's bill upon the merits, for it must be admitted, if the plaintiff company's contention is sustained, the defendant should be restrained from further insistence upon his present demand or from making further like demands.

That the granting of the writ prayed for will render further proceedings unnecessary under the act of 1910 must be admitted, and, on the other hand, a determination in these proceedings fixing liability on the company will undoubtedly be accepted.

VIII.

The Right to Sue for the Recovery of Money Paid is an Ineffective and Inadequate Remedy of Doubtful Results.

The suggestion that plaintiff could sue to recover the amount deposited is not a particularly sound

one. It is the contention of this company that it is not within the act of June 25, 1910, under which the demand is made, and if that contention be sound payment in response to the demand of the Secretary might not be recoverable.

In *Garr, Scott & Co., vs. Shannon,* 233 U. S., 468, 472, 473, it was said:

> "If, therefore, the plaintiff had been included in the class to which this statute applied, and, under the duress of its automatically enforced provisions, had paid the taxes to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional, and to a review of the judgment if it had been adverse to the company's contention. But the company did not, in any sense, come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute did not require from it the payment of the tax. For the Supreme Court of Texas in Allen *vs.* Tyson-Jones Buffy Co., 91 Texas, 22, and Miller *vs.* Goodman, 91 Tex. 41, had held that the franchise tax act had no application to corporations doing an intrastate business. The duress of its provisions, therefore, operated only on those doing intrastate business; and if the plaintiff, on a mere demand, paid the tax imposed by a statute, applicable only to other corporations, it had no more right to recover than would a drygoods merchant who voluntarily

paid a tax illegally imposed on those engaged in the selling of liquor.

To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the rule "one who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

Southern Railway vs. King, 217 U. S., 524, 534.

Railroad Co. vs. Commissioners, 98 U. S., 541.

Little vs. Bowers, 134 U. S., 554.

Even were it admitted, however, that had the plaintiff deposited the money demanded, it might have afterwards recovered the same upon suit instituted in the Court of Claims, the most that could be recovered would be the amount actually deposited. Before recovery much time must elapse, for after judgment is secured an Act of Congress is necessary appropriating the money to meet the judgment and thus the company would not only have been deprived of the use of its money improperly demanded without interest, but would be put to the great expense of maintaining suits on demands as fast as brought and to await the pas-

sage of an act of Congress making appropriation to cover the same.

The suggestion of the doubtful, and at best limited right of recovery is in no sense an answer to the suit instituted, nor can the remedy if available be held adequate and complete.

Summary.

The whole situation may be summed up in the statement that this company does not believe itself liable for any part of the costs for the surveying, selecting, and conveying of the lands granted by the act of July 27, 1866, which were earned by the construction of the railroad opposite thereto by its predecessor in interest, and paid for by those constituting the present company, consisting of those furnishing the money for such construction, whose equities were recognized and respected by direct act of the Congress. It has paid large sums, under protest, for the surveying, selecting, and conveying the particular tracts granted and in the particular instance involved in this proceeding tendered an amount equal to the costs of the greatest possible amount of lands receivable by the plaintiff within the townships named. After its title is fully ripened by full compliance with the conditions of the granting act of July 27, 1868, this unrighteous demand is made to deposit, under threat of forfeiture, the entire costs for the surveying of certain named townships within the

primary limits of its grant, with full knowledge that if acceded to it must make like deposits for the surveying of the entire unsurveyed area within its grant.

There is no provision of existing law with regard to the survey of any lands granted to any company which is possible of a construction justifying such a demand.

That the same was arbitrary and capricious is fully shown by the following facts:

(*a*) A request by the Secretary of the Interior for legislation to enable him to secure the survey of lands within railroad limits, and with particular reference to the necessity and desirability of surveying the Government lands in railroad limits within forest reservations so that such reservations could be more efficiently managed.

(*b*) A specific request that such legislation embrace an appropriation of $500,000 to cover the estimated cost of surveying the even-numbered sections belonging to the United States.

(*c*) Continued demands upon the railroad companies after the passage of the act of 1910 for deposits of only enough to pay the survey costs of the odd-numbered sections enuring to the company.

(*d*) A complete departure from his recommendation to Congress about the necessity of surveying the Government lands within forest reservations, and a statement that the department did not desire such surveys made.

(*e*) An attempt to have plaintiff pay the cost

of surveying the lands of the United States with knowledge that the odd-numbered sections could not possibly be surveyed without the survey of the even-numbered sections as well.

(*f*) An attempted differentiation between lands reserved and those not reserved, whereby under the same grant and under the same act of 1910, plaintiff is required to pay the cost of surveying not only the odd-numbered sections in those reservations, but the entire cost of both the odd- and even-numbered sections when reserved.

These questions, and the action of the Secretary, can, in our opinion, only be properly disposed of by a court of equity, and we cannot more strongly or pointedly characterize the action of the Secretary, and of our right to relief in equity, than as set forth by Mr. Justice Van Orsdel in his dissenting opinion in the court below, reading as follows (Rec., p. 22):

> "I agree with my associates that the act of 1910 applies to defendant company, but I am unable to agree with the holding that the action of the Secretary in requiring the railroad company to pay the whole cost of the survey is not arbitrary and unwarranted under the law.
>
> "This is not an instance where the convenient and elastic rule of 'possible construction' applies. A 'possible construction' can mean no more than a reasonable construction. It cannot be construed to cover any arbitrary interpretation an official may choose to place upon a statute. If the

official's construction is such as to confer arbitrary power in the face of the clear command of the law, it cannot be that courts are estopped from granting extraordinary relief. In other words, the expression 'possible construction' is certainly not susceptible of an interpretation which will result in an investment of arbitrary power.

"The Secretary makes no contention that he is following the law. He admits that he is ignoring the construction heretofore followed by the Department; admits that under the subterfuge adopted the railroad company will be compelled to pay the cost of the entire survey; admits that he has no intention of returning any part of the deposit, except so much as is left after the paying the entire cost of the survey; admits that the survey and platting of the railroad land *ipso facto* establishes the corners and completely surveys and plats the intervening Government sections, and admits that the proposed proceeding may be unauthorized; but attempts to justify his action on the excuse that he has decided that the Government does not desire to survey its land at this time, but concedes in the same breath that in carrying out the proposed scheme the Government will get a complete survey of its lands free of charge. With the completed survey of the railroad lands, the survey of the intervening lands will be equally complete. Hence to assert in justification of the action here taken that the Government does not desire to survey its lands, when admittedly the subterfuge here adopted indirectly accomplishes that end, amounts to an evasion of the express commands of the law.

> "If the threatened acts are unauthorized by the act of Congress (which seems to be conceded on all sides) the proceeding, in so far as holding up the railroad company for the full cost of the survey, is totally without legal authority and as void as if no law existed on the subject. If a court of equity is powerless to stay the hands of an official of the Government from perpetrating through the proposed scheme this threatened injury, the guarantee of justice through the agency of the courts becomes a farce, and the citizen is left without protection from the arbitrary and capricious exactions of executive power."

Wherefore, the plaintiff in error prays the court to reverse the decision of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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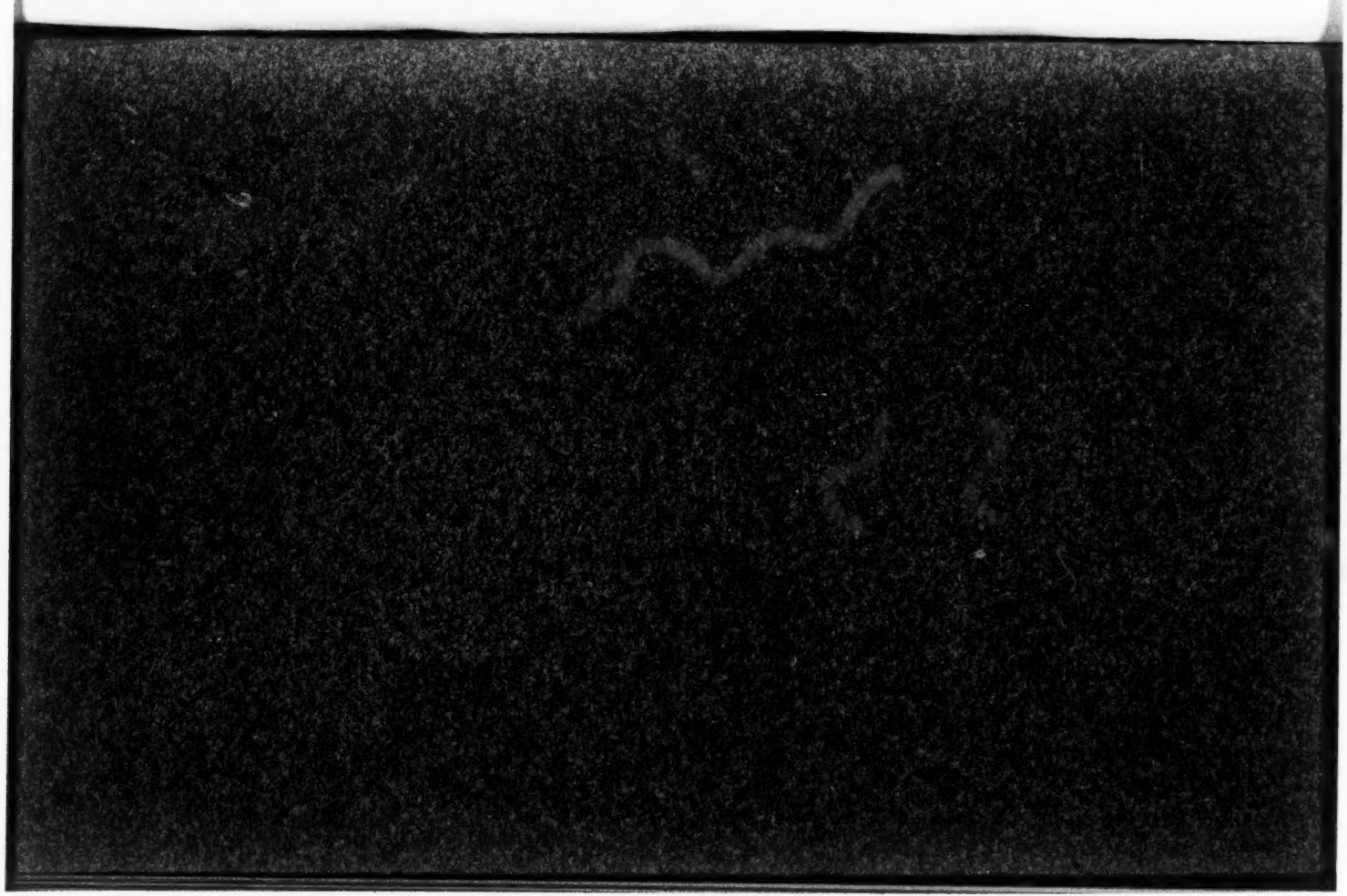
[redacted]



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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE SANTA FE PACIFIC RAILROAD COMPANY, appellant,
v.
FRANKLIN K. LANE. } No. 170.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE.

STATEMENT.

The appeal of the Santa Fe Pacific Railroad Company (R. 25) brings up for review a decree of the Court of Appeals of the District of Columbia (R. 23) which affirmed a decree of the Supreme Court of the District (R. 16) dismissing the appellant's bill (R. 1).

The bill sought an injunction against the Secretary of the Interior to restrain his insistence upon a demand (R. 4) made by him on the appellant June 14, 1914, for a deposit of $5,500 to pay the cost of field and office work involved in surveying the odd-numbered sections in four specified townships in Arizona within the primary limits of the public land grant to the appellant's predecessor, the Atlantic and Pacific Railroad Company.

The allegations of the bill bring into consideration the following acts of Congress and proceedings thereunder:

The act of July 27, 1866 (14 Stat. 292), to aid in the construction of a continuous railroad and telegraph line from Springfield in the State of Missouri to the Pacific Ocean (§ 1), granted to the Atlantic and Pacific Railroad Company, along and adjacent to the projected line, subject to prior appropriation, the nonmineral odd-numbered sections of public land, twenty sections to the mile in territories and ten sections to the mile in states and, in case of loss through prior appropriation or mineral character, other lands of similar designation and character within specified limits (§ 3), to be conveyed by patents upon completion and acceptance of each twenty-five miles of road, such patents to embrace the granted lands lying opposite to and coterminous with the completed portions (§ 4); required, "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad" (§ 6); conditioned the operation of the grant upon the commencement of construction work within two years from the approval of the act, the completion of not less than fifty miles of road per year after two years, and the final completion and full equipment of the main line of the whole road by July 4, 1878 (§ 8); declared "that if the said company make any breach of the conditions hereof, and allow

the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road" (§ 9); and provided that "Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act" (§ 20).

The act of April 20, 1871 (17 Stat. 19), authorized the Atlantic and Pacific Railroad Company to "mortgage its road, equipment, lands, franchises, privileges, and other rights and property," and provided, "That if the company shall hereafter suffer any breach of the conditions of the act above referred to [the granting act of 1866], under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

The findings of this court in the case of *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 418, 442, show that the grantee company was delinquent in the fulfilment of every condition of the grant of 1866 from the beginning; that on July 4, 1878, the date fixed by the granting act for the completion of the road, it had constructed only 125 miles of the 2,267 miles contemplated for the entire line; and that from 1871 to 1880 it did practically nothing. See also H. R. No. 193, 49th Congress, 1st session.

The act of July 31, 1876 (19 Stat. 102, 121), required, as a condition to the conveyance of any land granted to any railroad company by the United States, payment by such company of "the cost of surveying, selecting, and conveying" such lands "unless such company is exempted by law from the payment of such cost."

The act of July 6, 1886 (24 Stat. 123), forfeited the grant of 1866 for nonperformance of its conditions as to all of the granted lands lying "adjacent to and coterminous with the uncompleted portions of the main line of said road." This forfeiture was sustained in the *Atlantic and Pacific Railroad* case above referred to.

The act of March 3, 1897 (29 Stat. 623), authorized the purchasers at foreclosure sale of the mortgage under the act of 1871 to form a new company as successor to the Atlantic and Pacific Railroad Company "subject to all the obligations and duties to the United States" of the original company, and provided that nothing in the act shall be held "to deprive the United States of any right or remedy they may at any time have had" against the original company, or "construed as making any additional grant of lands" or "as a waiver of any rights of the United States now existing to enforce any forfeiture of lands heretofore granted" to the original company.

Under this act the appellant company was formed and succeeded to all the rights and properties of the original grantee company.

The act of June 25, 1910 (36 Stat. 834), "to enable the Secretary of the Interior to complete the adjustment of land grants made by Congress to aid in the construction of railroads, and to subject the lands granted to taxation," provides that every railroad company "required by law to pay the costs of surveying, selecting, or conveying any lands granted to such company" by any act of Congress, shall deposit within ninety days after demand by the Secretary of the Interior "a sum sufficient to pay the cost of surveying, selecting, and conveying" any such unsurveyed lands, the demand to specify the amount of the required deposit and, in the Secretary's discretion, to cover all or any designated part of such lands granted to such company, the money so deposited to be disbursed by the Land Department "for the surveying, including office and field work, selection, and conveyance" of such lands, any amount deposited in excess of such costs to be repaid. By the provisions of section 2 of the act, neglect or refusal for ninety days to comply with such demand, forfeits the lands designated therein to the United States, and the Secretary is required to notify the Attorney General, "who shall at once commence proceedings to declare the forfeiture and to restore the lands forfeited to the public domain."

The demand complained of is set out in paragraph 8 of the bill (R. 4) as follows:

> Under and by virtue of the authority conferred upon me by the act of June 25, 1910

(36 Stats., 834), demand is hereby made upon you for a deposit, in a proper United States depository to the credit of the United States of $5,500, which is determined to be a sum sufficient to pay the cost of the field and office work involved in surveying the unsurveyed lands granted to the Atlantic and Pacific Railroad Company, within the primary limits of said grant in the following townships:

T. 19 N., R. 5 W., G. and S. R. M., Arizona.
T. 19 N., R. 6 W., " " " " " "
fractional T. 19 N., R. 7 W., " " " " " "
T. 20 N., R. 6 W., " " " " " "

Should you neglect or refuse to deposit said sum of $5,500, as hereinbefore required, within ninety days from receipt by you of notice hereof, this department will notify the Attorney General to the end that he may at once, as provided in said act, commence proceedings to declare a forfeiture of the grant as to the townships enumerated, and to restore the granted lands in the public domain.

Paragraph 9 of the bill (R. 4) alleges a protest by the company to the Surveyor General, in which it was suggested that the amount of $5,500 demanded was "probably the total cost of the survey," and stating that "under the law" the company "is only required to deposit one-half thereof."

Paragraph 10 (R. 5) sets out the Surveyor General's reply, in which he stated that the estimate was not made by him but in the General Land Office, and stated his "opinion that the sum of $5,500.00 called for would cover the entire cost."

Paragraph 11 (R. 5) asserts the non-liability of the company "to pay any part of the cost for surveying or conveying the lands granted" by the act of 1866, or to make any deposit under the act of 1910, and alleges that "nevertheless in order to facilitate the adjustment of the grant" the company has always heretofore, on demand, "advanced the cost of the surveying of its lands under the heretofore uniform administration of said act by the Secretary of the Interior based on the proportionate cost of the amount that your orator's lands in any given township bears to the entire cost of surveying of the township, and for that reason your orator sought of the Secretary of the Interior modification of the present demand for deposit for surveying to one-half of the cost of surveying of the township named, as estimated by the U. S. Surveyor General." To this, it was alleged, the Secretary answered: "It was not the purpose of the Department to require a deposit for the survey of any lands except those granted to the company. It is not now proposed to survey any of the public lands within the townships specified in the demand made on the company. It is the judgment of the Department that the public interest requires the immediate survey of the railroad lands in those townships, and that the public interest does not require the survey of the even-numbered sections in those townships. Under such circumstances, the Department is clearly of the opinion that the company was properly required to pay the cost of the

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field and office work involved in the survey of its granted lands, even though it be admitted that the cost to the company would be much less were it deemed proper at this time to direct the survey of all the lands within the townships named."

Paragraph 12 (R. 6) alleges that the amount demanded "for survey of the townships named is the estimated cost of surveying the entire townships, including both the odd and even numbered sections thereof, and in this respect is a departure from the heretofore uniform administration of the Interior Department under the said act of June 25, 1910." Paragraph 13 (R. 6) alleges a formal tender by the appellant "of one-half of the estimated cost for survey of the entire townships named," which was refused. And paragraph 14 (R. 6) alleges that the Secretary "is unlawfully and in excess of any authority granted him, continuing" and "pressing this demand under penalty of proceedings in forfeiture of your orator's grant, so far as these townships are concerned."

ARGUMENT.

In order to meet the several propositions advanced in the brief of counsel for the appellant we deem it sufficient to make the following counter propositions:

(1) The appellant is required by law to deposit the cost of surveying, selecting and conveying the lands claimed by it under the grant to its predecessor.

(2) The demand complained of was made in the discharge of a duty imposed by law and can not be controlled by injunction.

I.

Liability to deposit the cost of survey.

The act of June 25, 1910 (36 Stat. 834), is applicable by its terms to the unsurveyed lands granted to "any railroad corporation required by law to pay the costs of surveying, selecting, or conveying" such lands. The act of July 31, 1876 (19 Stat. 102, 121), requires, as a condition to the conveyance of any land granted to any railroad company by the United States, the payment by such company of "the cost of surveying, selecting, and conveying" such lands "unless such company is exempted by law from the payment of such cost." Section 6 of the granting act of July 27, 1866 (14 Stat. 292, 296), requires that the President "shall cause the lands to be surveyed . . . as fast as may be required by the construction of said railroad."

The first proposition of counsel for the appellant company is that the requirement of the act of 1866, that the President "shall cause the lands to be surveyed" amounts to an exemption of the company from the payment of the cost of survey within the exception of the act of 1876 and therefore without the operation of the act of 1910.

This proposition, if ever it presented ground for serious discussion, has been foreclosed by repeated rulings of this court. The phrase relied on of itself imports no exemption from payment for survey by the company, but only a reservation of the right of survey by the government (*United States* v. *Montana Lumber Mfg. Co.*, 196 U. S. 573, 577), together with

a corresponding obligation on the part of the government to make the survey. *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 441. It neither exempts from payment nor requires payment of the cost of survey, but merely omits to make any provision on that subject. The act of July 1, 1862 (12 Stat. 489, 493), and the act of July 2, 1864 (13 Stat. 365, 369), which contain a similar provision, have been treated as containing "no provision about the payment of the costs of survey." *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600, 609, following *Railway Company* v. *Prescott*, 16 Wall. 603, 607. In these cases subsequent acts of Congress requiring payment of the cost of survey were sustained; and the requirement to pay the cost of survey in the act of 1876 has been held to apply to a prior railroad grant which is "silent on the subject." *Pacific Railway Co.* v. *United States*, 124 U. S. 124, 128.

The usual provision for survey by the government had been omitted from the granting act involved in the case last cited, evidently because the lands had been surveyed by the government before its passage. But the same question of implied exemption was presented by another provision in the act which required the Secretary of the Interior to cause patents to be issued conveying the granted lands opposite to and coterminous with the road upon the completion and acceptance of each twenty consecutive miles thereof. It was contended that,

by the provision for issuing patents without requiring payment of the cost of surveying the lands already surveyed by the government, the company was "exempted by law from the payment of such cost," within the meaning of the act of 1876. But this contention was rejected and the court, speaking through Mr. Justice Blatchford, said (124 U. S. 128):

> There is no express statutory provision exempting the grantor to the petitioner from the payment of the cost of surveying the land. All that can be said is, that the act of March 3, 1871, was silent on the subject. It neither exempted the beneficiary from paying the cost of surveying, nor did it expressly require it to pay such cost. It and its grantee, therefore, fall within the provision of the act of 1876, because not within the exception contained in that provision.
>
> It is urged for the appellant, that, in the present case, the surveys had been made and paid for by the United States prior to the passage of the act of March 3, 1871, and that, as §12 of that act provided for the issuing of patents without requiring the payment of the cost of surveying, the company was therefore "exempted by law from the payment of such cost," within the meaning of the provision of the act of 1876; and it is suggested, that no statute in respect to the granting of public lands to either a State or a railroad company, passed prior to 1876, contained a provision expressly exempting the grantee from the payment of the cost of surveying. It is

> further urged, that the terms of the provision of the act of 1876 are not intended to apply to then existing grants, but only to future grants and to the cost of surveys to be made thereafter.
>
> But we are of opinion that the provision is a general one, and that, although it is enacted in connection with an appropriation of money for the survey of public lands and of private land claims, and follows a requirement that no patent shall issue for a private land claim until the cost of survey and platting shall have been paid into the Treasury by the party in interest, yet it is not controlled by those circumstances. It is manifestly general legislation, applying, as to the past, to all land theretofore "granted to any railroad company by the United States," and to the cost of surveying such land, whether that cost had been previously incurred or expended, or was to be incurred or expended in the future. The exception created, that the provision is not to apply to a company exempted by law from the payment of the cost, is general in its language. If such a company is to be found, the exception applies to it; if it is not to be found, the provision applies to it.

If the undertaking of the government to survey and convey by patent amounts to an exemption from payment of the cost of survey by the company, as contended for the appellant in the case at bar, with at least equal propriety the undertaking to convey by patent (survey having already been made by the government) should import a similar exemp-

tion. We therefore regard the language just quoted as a complete and decisive answer to the contention in this case.

It is further contended in the case at bar that the omission from the granting act of the requirement to pay the cost of survey could not afterwards be supplied by congressional act without violating the property rights of the grantee company under its contract with the United States. If the company had fully performed all of the other conditions of the grant and the granted lands had been justly earned when Congress imposed this omitted condition, a question as to the power of Congress in this respect might be presented. But such is not this case. None of the conditions of the grant had been fulfilled, but all of them had been broken, when the requirement to pay the cost of survey was imposed. The situation at that time is well stated by Mr. Justice Brown who delivered the opinion of the court in *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 441–442, as follows:

> The plaintiff company seems to have undertaken its great enterprise in building a transcontinental railroad without adequate appreciation of the difficulties to be surmounted, which finally caused a total suspension of its work; and, when in 1880, after the panic of 1873 had spent its force, it resumed operations, the time had already expired for the completion of the road, and it was only by the inaction or indulgence of Congress that it was permitted to proceed. So far as the road was

> built and accepted by the Government after that time, it was probably entitled to receive its appropriate land grant, but this was rather a matter of favor than of strict right. During this long period, from 1871 to 1880, it should, under its charter, have constructed at least fifty miles per year, and should have completed the whole road by July 1, 1878. But it did nothing.

It is thus established beyond cavil that, on July 31, 1876, when the act requiring payment by the company of the cost of survey was passed, the grantee company had broken every condition of the grant, to the point of abandonment of the work. For five years it had been wholly inactive and hopelessly delinquent. In 1876 none of the lands embraced in the grant had been earned under the terms of the contract, certainly not those now in question lying in Arizona, and this additional requirement, if such it may be called, fell justly within the power reserved to Congress in the granting act to "add to, alter, amend, or repeal" that act. But, independently of this reserved power, "until the lands were earned, and other acts that the law demanded that the company should do had been done, it had no such right in the lands as would prevent Congress from passing a remedial provision so eminently just as the one under consideration." *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600, 609; *Pacific Railway Company* v. *United States*, 124 U. S. 124, 129–131; *Railway Company* v. *Prescott*, 16 Wall. 603, 608.

Counsel for appellant rely upon the case of *Lane* v. *Watts*, 234 U. S. 525, 541, as maintaining a different doctrine. In that case there had been conflicting Mexican grants in the Territory of New Mexico the validity of which were recognized by the treaty of Guadalupe Hidalgo and acts of Congress passed in pursuance thereof. In this situation the heirs of Baca, claimants under one of the conflicting grants, at the instance of the government, agreed to relinquish their rights to the tract in conflict and to select an equal quantity of unoccupied non-mineral public land elsewhere in New Mexico. To carry out this arrangement, the act of June 21, 1860 (12 Stat. 71, 72), authorized such selection and required "the Surveyor General of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them." The subsequent act of June 2, 1862 (12 Stat. 410), provided "That all claims or grants of land in any of the States or territories of the United States, derived from any foreign country or government, shall be surveyed under the direction of the proper officers of the government of the United States upon the application of the parties claiming or owning the same, and at their expense, which shall be paid or secured to the satisfaction of the Secretary of the Interior before the work shall be performed." It was held that the heirs of Baca were not required to pay the cost of survey under the act of 1860 and that the act of 1862 did not apply to them.

There are several important distinctions between that case and the one under consideration. The heirs of Baca were not the recipients of a munificent bounty at the hands of the government, but were parties to an accommodation proposed by and beneficial to the government. The lands granted to them by the government had not to be earned, but had only to be selected. No further conveyance was necessary to pass or confirm the title, and the survey was to be made by the government when "required" by the grantees. No subsequent act of Congress required them to pay the cost of survey. The act of 1862 related only to grants "derived from any foreign country or government." The Baca grant was derived from the United States and in consideration of an arrangement made for its accommodation.

Counsel refer to the case of *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 441, as recognizing the obligation of the government to survey these granted lands "as fast as may be required by the construction of said railroad." Such obligation of the government is not to be denied. But in this there is nothing inconsistent with the obligation imposed on the company to pay the cost of survey. Indeed it is shown in that case that the company did not then question its obligation to pay the cost of survey. As the court said in the case cited (p. 441), "the railroad company offered to furnish the money for such surveys," evidently in compliance with its acknowledged obligation. And in this connection it is significant

that, as shown by the bill of complaint herein (R. 5), and as found by the court below (R. 21), "until the filing of this suit appellant conceded that under said acts of July 31, 1876, and of June 25, 1910, it was liable to pay at least one-half the cost of the survey of the lands in question."

Reference is also made to the act of April 20, 1871 (17 Stat. 19), which authorized a mortgage of the grant of 1866 by the original grantee, and to the act of March 3, 1897 (29 Stat. 623), under which the appellant company succeeded to the properties and rights of the original company by purchase at the mortgage foreclosure. With respect to the mortgage, this court said in *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 430, that "the mortgagees, standing in the place of the mortgagor, had no greater rights than it had." And with respect to the act of 1897, it is enough to observe that it makes no additional grant, but expressly saves the rights and remedies of the government against the grantee company under the act of 1866 and expressly makes the successor company "subject to all the obligations and duties" of its predecessor. One such obligation or duty was that imposed by the act of 1876 to pay "the cost of surveying, selecting, and conveying" the granted lands. The right of the government to enforce this obligation, by forfeiture if necessary, is unaffected by the circumstance that the act of 1866 was in terms a present grant. *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241, 253; *Ankeny* v. *Clark*, 148 U. S. 345, 357.

II.

Power of the Secretary to make the demand in question.

The primary purpose of the act of June 25, 1910 (36 Stat. 834), evidently was to subject the unsurveyed lands which had been granted to railroad companies to local taxation. This court having decided that no such granted lands could be taxed by state or territorial authority, because of the interest of the United States therein, prior to the fulfilment of every condition of the grant by the railroad company, including payment of the cost of survey, the act of July 10, 1886 (24 Stat. 143), relieved the resulting embarrassment in part by permitting such taxation of surveyed lands prior to such payment. *Northern Pacific Railway* v. *Myers*, 172 U. S. 589, 598. But this act left the unsurveyed lands nontaxable, clearly because it was impracticable to tax them without identification, which was possible only after survey. The government, for obvious administrative reasons, had reserved to itself the right of survey. *United States* v. *Montana Lumber Mfg. Co.*, 196 U. S. 573, 577. Hence resulted a just ground of complaint by the local authorities against the government which the act of 1910, by providing for the rapid survey of these lands, was intended to remove.

No obligation rested on Congress to appropriate money to pay the cost of these necessary surveys, since the railroad companies held the lands subject to the obligation to make such payments. It was

therefore eminently just to require them to deposit "a sum sufficient to pay" such costs. Naturally, upon the Secretary of the Interior, who is the administrative officer of the government in charge of the public land business, was imposed the duty to "determine and specify" the "amount of the required deposit" and to make "demand" therefor. The amount required to survey the granted railroad lands in four designated townships was determined by the Secretary in this case and specified in his demand on the the company.

The complaint is that this determination of the Secretary was based upon an erroneous construction of the law, resulting, it is said, in this demand for double the amount which should have been required upon a correct construction. But whether the Secretary's construction of the law in this respect was right or wrong, it was none the less a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, which he can not be compelled to retract or modify. *Ness* v. *Fisher*, 223 U. S. 683, 691–692. As this court said in *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, speaking through Mr. Justice Peckham:

> Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

It is insisted, however, that the Secretary's decision in this case was but a subterfuge to evade the law and enable him to commit an act of arbitrary oppression against which injunctive relief should be granted within the principle of *Garfield* v. *Goldsby*, 211 U. S. 249, 262, and *Lane* v. *Watts*, 234 U. S. 525, 540. This is so, it is urged, because the law only authorizes a demand for a sum sufficient to pay the cost of surveying the odd-numbered sections granted to the railroad company, and the demand complained of is for a sum sufficient to pay the cost of surveying the entire designated townships, including the even-numbered sections reserved to the United States. There might be some force in this if it were possible to survey the odd-numbered sections of a township without surveying the entire township. But the contention refutes itself, for in maintaining it counsel say (Brief, p. 38), and to this we readily agree, that "it is impossible to make a proper survey and marking of the odd-numbered sections of a township without at the same time accomplishing the survey and marking of the even-numbered sections." This, as we understand it, is but to say that "it is impossible to comply with the law without deciding precisely as the Secretary decided here;" for the act of 1876 plainly requires the company to pay the entire cost of surveying the lands granted to it, not one-half such cost, and the act of 1910 requires the Secretary to estimate and make demand on the company for a corresponding deposit. This reading of the statutes is more clearly manifested, if possible, by the consideration that the

obligation of the company is to pay, and the duty of the Secretary is to demand a deposit sufficient to pay, not only "the cost of surveying" these lands, but also the cost of "selecting and conveying" them. The language is, "the cost of surveying, selecting, and conveying." As it can hardly be said that the words, "the cost of selecting and conveying," mean only one-half and not the entire cost thereof, so it is difficult to perceive how the words, "the cost of surveying," can have any different meaning.

If there were any ambiguity in these statutes, we would suggest that the court "should feel bound, upon familiar principles, to give the government the benefit of the doubt." *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413, 429. For the government, by virtue of its right to receive the money for this survey and its lien on the lands for this payment (*Ankeny* v. *Clark*, 148 U. S. 345, 357), is the real party in interest. *Naganab* v. *Hitchcock*, 202 U. S. 473, 475.

With reference to the contention that this decision of the Secretary is at variance with the hitherto uniform construction of the act of 1910 by his department, we suggest that this court has many times declined to be bound by such departmental construction where the statute in question was free from ambiguity (*Fairbank* v. *United States*, 181 U. S. 283, 310–311, and cases cited), and that the Secretary of the Interior, charged with the duty to exercise his independent judgment, is not to be condemned for following that example. That he considered the force

of the former practice is to be presumed, since it was called to his attention by the appellant, and his reversal of it, even if the language of the statute were ambiguous, was just as much an exercise of judgment and discretion committed to him by law as if the question had been one of first impression. Upon this ground the court declined to interfere with an act of the Postmaster General founded upon his construction of a statute contrary to that which had obtained in his department for more than sixteen years. *Houghton* v. *Payne*, 194 U. S. 88, 98–99.

It is finally urged that section 2 of the act of 1910, which prescribes the penalty of forfeiture for default, is void because it is calculated to so terrorize the railroad companies as to compel them to forego litigation to protect their rights, within the principle of *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 662, and *Ex parte Young*, 209 U. S. 123, 148.

A mere demand without some adequate means for its enforcement would be manifestly futile. An ordinary action to recover the amount demanded would be absurdly inadequate, since in that case the railroad companies by extended litigation could retain the lands free from taxation for years to come, and not only so with respect to their own lands represented by the unsurveyed odd-numbered sections, but also with respect to the government lands represented by the unsurveyed even-numbered sections. An adequate penalty for neglect or refusal to make the required deposit within a reasonable time after demand was therefore necessary.

Infliction of the penalty is circumscribed by the statute in every reasonable way. The company is given ninety days in which to make the deposit. It is in default only if it should "neglect or refuse" to comply for that length of time. Default does not operate as a forfeiture, but a suit is provided for, to be instituted by the Attorney General after notice from the Secretary. No remedy less drastic and at the same time adequate to accomplish the salutary purpose of the act was available.

The question decided by the Secretary is not one depending on a showing of extrinsic facts requiring an extended investigation of a complicated and technical character; it is a simple question of the construction of a statute upon admitted facts. No enormous and overwhelming penalties are inflicted; the forfeiture is no more drastic than is reasonably necessary to enforce the demand and covers only the lands to be surveyed and designated therein. No penalty for disobedience is inflicted at all events; the appellant may disregard the demand and defend against the forfeiture proceeding and, if it fears to do that, it may pay the amount demanded and resort to the Court of Claims for recovery of any supposed unlawful excess. The correctness of the Secretary's decision is not so disputable and uncertain as to call for extraordinary relief pending an orderly determination in the forfeiture proceeding or in the Court of Claims; indeed we think, for the reasons before stated, that the Secretary was clearly right, whatever

may be said of the reasons he is alleged to have advanced to sustain his decision.

We therefore regard the citation by counsel of *Wadley Southern Ry.* v. *Georgia* and *Ex parte Young* as inapposite.

III.

Jurisdiction.

We refrain from discussing the question of jurisdiction over the cause as one in substance and effect against the United States (*Naganab* v. *Hitchcock*, 202 U. S. 473, 475), since the considerations involved in this question are "coincident with those required to be taken into view in order to determine the power of the Secretary." *Lane* v. *Mickadiet*, 241 U. S. 201, 210.

CONCLUSION.

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be affirmed.

FRANCIS J. KEARFUL,
Counsel for the Appellee.

DECEMBER, 1916.

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SANTA FE PACIFIC RAILROAD COMPANY *v.* LANE, SECRETARY OF THE INTERIOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 170. Argued April 18, 1917.—Decided June 11, 1917.

In view of the power reserved to add to, alter, amend or repeal the act granting land to the Atlantic and Pacific Railroad Company (July 27, 1866, c. 278, 14 Stat. 292), and of the grantee's failure to comply with the conditions as to construction, Congress, without violating any vested right and consistently with the Fifth Amendment, could lay upon the grantee the cost of surveying the lands granted and require payment thereof as a condition to the issuance of patents, as was in fact done, in respect of said company, by the general provision in the Act of July 31, 1876, c. 246, 19 Stat. 121.

The construction placed by the Land Department upon the Act of 1876, *supra*, to the effect that it required the grantee to pay only a share of the cost of surveying and sectionizing a township proportional to the area of its granted lands (odd sections) within that township, was not only reasonable but, being undoubtedly known to Congress, must be deemed to have been approved by and in effect incorporated in the Act of June 25, 1910, c. 406, 36 Stat. 834, which makes no change in the grantee's obligation beyond advancing the time of payment.

This view is corroborated by the Senate and House committee reports preceding and explaining the Act of 1910.

As a demand by the Secretary of the Interior based on the Act of 1910, *supra*, that the railroad grantee make a deposit to cover the entire cost of surveying a township, in which only part of the lands belongs to such grantee, is clearly unwarranted by those acts, its effectuation may be enjoined if the other elements requisite to such relief are present.

The claim evidenced by such a demand casts a serious cloud on the large areas of other unsurveyed land in the railroad grants and therein threatens the grantee with serious embarrassment; and the provision in the Act of 1910 for forfeiture if the demand be not complied with, to be followed by proceedings by the Attorney General, is also to be considered as a reason for equitable relief.

The grantee is not required, in order to test the validity of such a demand, to adopt the hazardous and embarrassing course of ignoring it and defending such suit as the Attorney General may institute under the Act of 1910.

The Secretary of the Interior having demanded under the Act of 1910, *supra*, an amount equal to the entire cost of surveying certain townships of which the railroad grantee could not lay claim to more than half, a tender of one-half the amount demanded was adequate.

43 App. D. C. 497, reversed.

THE case is stated in the opinion.

Mr. Alexander Britton, with whom *Mr. Evans Browne* and *Mr. Francis W. Clements* were on the brief, for appellant.

Mr. Assistant Attorney General Kearful for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the Secretary of the Interior from insisting upon or giving effect to a demand heretofore made by him on the plaintiff to the effect that the latter make an advance deposit, under the Act of June 25, 1910, c. 406, 36 Stat. 834, of $5,500 to cover the cost of surveying certain lands within the primary limits of the land grant made by the Act of July 27, 1866, c. 278, 14 Stat. 292, to the Atlantic and Pacific Railroad Company, to whose rights the plaintiff has succeeded. The court of first instance refused the injunction and dismissed the bill, and its action was affirmed. 43 App. D. C. 497.

The land grant was made in aid of the construction of a proposed railroad from Missouri through Arizona to the Pacific Ocean, and included, subject to exceptions not here material, every alternate odd-numbered section of public land within defined limits on either side of the road.